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No. 80-2116

# In the Supreme Court of the United States

**October Term, 1981**

WILLIAM ARCHIE WILLIAMS,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

1. Whether Congress in passing 18 U.S.C. § 1014 intended to proscribe the deposit of bad checks or "check kiting".

2. Whether a non-collected check upon which a bank extends credit and which is an enforceable obligation can be alleged in an indictment to be a "false statement" under 18 U.S.C. § 1014 on the theory that it is "overvalued".

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## BRIEF FOR PETITIONER

### OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported at *United States v. Williams,* 80-3064, 639 F.2d 1311 (5th Cir. 1981). This opinion appears in Appendix A to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed in this Court on June 13, 1981.

### JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 19, 1981. A timely Petition For Rehearing and Suggestion for Rehearing *En Banc* were denied on April 17, 1981. The petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit was filed on June 13, 1981, and the petition

was granted on November 9, 1981. The Court amended its grant of the petition on December 7, 1981 to limit it to questions 3 and 4 presented by the petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

18 U.S.C. § 1014 (1970).

"Whoever makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134-m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve Bank, a small business investment company, a Federal Credit Union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Ad-

ministrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment or loan, or any change or extension of any of the same, by renewal, the deferment of action or otherwise, or the acceptance, release or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

## STATEMENT OF THE CASE

On October 19, 1979, a three-count superseding indictment was returned against William Archie Williams (hereinafter "Williams"), the petitioner in this matter. Count I of the indictment alleged that Williams had, with intent to injure and defraud, misapplied funds of the Pelican State Bank (hereinafter referred to as "PSB"), in the amount of $58,055.44, in violation of 18 U.S.C. § 656. Counts II and III of the indictment alleged similarly that Williams had willfully overvalued "a security" in violation of 18 U.S.C. § 1014 by depositing a personal check drawn on his account at Winn State Bank in his account at PSB (Count II), and a personal check drawn on his account at Pelican State Bank in his account at Winn State Bank (Count III), then knowing that there were insufficient funds in the accounts at the respective drawee banks to cover the checks. J.A. 2-4.[1]

On December 12, 1979, Williams was convicted on all three counts of the indictment. Williams was given probation on Counts I and II, and was sentenced to serve six months in prison on Count III. J.A. 39-40. Williams appealed his conviction to the United States Court of Ap-

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1. "J.A." refers to the Joint Appendix to the Brief for Petitioner.

peals for the Fifth Circuit (No. 80-3064), and on March 19, 1981, Judge Kunzig, Judge of the United States Court of Claims, sitting by designation, wrote the opinion which is the subject of this petition affirming the conviction of Williams on all three counts. 639 F.2d 1311; A1-22.[2] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

This Court granted the petition for writ of certiorari on November 9, 1981. On December 7, 1981 this Court limited the grant to questions 3 and 4 as presented by the petition. J.A. 40. These questions relate directly to the sufficiency of alleged violations of 18 U.S.C. § 1014. See Counts II and III of the indictment.[3]

On appeal to the Fifth Circuit Williams contended, in part, that the conviction on Counts II and III be reversed on the following grounds (1) that Counts II and III failed to state an offense within the reach of 18 U.S.C. § 1014; (2) that a non-collected check is not "security" within the meaning of 18 U.S.C. § 1014; (3) that, as a matter of law, a check is not "a security"; (4) that § 1014 does not cover "check kiting"; and (5) that such a check cannot be false under 18 U.S.C. § 1014 on the theory that it is "overvalued". See Reply Brief of Appellant, *United States v. Williams*, 639 F.2d 1311 (5th Cir. 1981). Relying primarily on *United States v. Payne*, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 455 U.S. 903 (1980), the Fifth Circuit rejected these claims. 639 F.2d at 1319-1320; A19-20. *Contra*, see *United States v. Sher*, 505 F. Supp. 858 (W.D. Penn. 1981), *aff'd*, No.

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2. "A" refers to the Appendix to the printed Petition for Certiorari.

3. If this Court dismisses Counts II and III, we vigorously contend that the evidence introduced at trial on Counts II and III so infected and permeated this matter so as to require a new trial as to Count I. See e.g. J.A. 20-21, 23-27, 35-38. The numerous references to "check kiting" made it impossible for the petitioner to receive a fair trial on Count I.

81-1317 (3rd Cir. August 14, 1981), *petition for cert. filed*, No. 81-1047 (3rd Cir. Dec. 4, 1981); *United States v. Edwards*, 455 F. Supp. 1354 (M.D. Penn. 1978); *United States v. Pavlick*, 507 F. Supp. 359 (M.D. Penn. 1980).

Counts II and III allege essentially that the mere presentment of a check for deposit at a collecting bank, without more, violates § 1014 if at the time of the presentment for deposit there were insufficient funds at the drawee bank. "Check kiting" was not alleged by Counts II and III of the indictment.

No evidence was presented at trial suggesting or even intimating that the petitioner made any oral or written statement or representation at the time when the checks at issue were presented for deposit at the collecting banks named in Counts II and III. See, e.g. J.A. 7-10, 12-17, 28; Tr. p. 36.[4] As significantly, it was not alleged nor was any evidence presented at trial that the petitioner requested immediate credit on the checks which were presented for deposit at the bank named in Counts II and III. *Id.* See also Counts II and III. J.A. 2-4. Moreover, it was not alleged nor was any evidence presented at trial that the petitioner requested a loan or credit from the collecting banks named in Counts II and III or that the checks presented were to be held by the bank as security. *Id.*

However, the government contended at trial with respect to the alleged violations of Counts II and III that the petitioner was involved in a "check kiting scheme" and that the mere presentment of a check for deposit at a collecting bank constituted an overvalued security within the reach of 18 U.S.C. § 1014 if *at the time of presentment for deposit* the drawee bank had insufficient funds to cover that check. J.A. 21-30. Government counsel throughout

4. "Tr." refers to the trial transcript.

the trial questioned witnesses with respect to whether the evidence adduced constituted "check kiting" and repeatedly led the jury to believe that Counts II and III as alleged constituted a criminal offense by focusing upon whether the petitioner had sufficient funds at the drawer bank to cover the checks at the time he wrote the checks. *Id.*

The Court charged the jury that a check is "a security" for purposes of § 1014 and further instructed the jury that the government had charged the petitioner with "check kiting." J.A. 35-37. The trial court charged in part as follows:

> "A check is a security for purposes of § 1014. The government charges that Mr. Williams was involved in check kiting—a scheme whereby false credit is obtained by the exchange and passing of worthless checks between two or more banks. This is not simply writing checks on a personal account, which may be temporarily overdrawn. Check kiting involves more than the mere use of a check with insufficient funds in the bank to meet it. It involved a series of acts, which, taken together, constitute a scheme built upon a series of false representations designed to give the defendant time and credit.
>
> In check kiting, a bad check is given. Money or credit is received from a bank other than the one on which the check is drawn. This credit is normally used immediately. The check kiter then deposits a second check in the bank upon which the original check is drawn. The second check is drawn on a different bank and is deposited in the first bank before the original check arrives. Credit for the second check is taken, which covers the first check. The process is carried on, back and forth, until the scheme is discovered." J.A. 36-37.

The record in this case shows that the petitioner made a conditional delivery of a $58,500 check drawn on the Winn State Bank to Ollie Stone, cashier at the Pelican State Bank, telling him to hold the check until the sale of Taylor Motor Co. (TMC) was consummated. J.A. 12, 31-32; Tr. p. 36. The petitioner expected to receive proceeds that day from the sale due to his having advanced personal funds to GM, on behalf of the bank, in payment for cars shipped to TMC. J.A. 31-34.

After the sale was consummated, and on the same day, the petitioner brought back a $60,000 money order to exchange for the check. J.A. 31-34. He learned that Ollie Stone had not held the check, but had deposited it to his PSB account. J.A. 33-34. Petitioner told Stone to credit the $60,000 money order to his PSB account. J.A. 31-35. Petitioner then drew a check for $60,000 on his PSB account and deposited it at the Winn State Bank. J.A. 14, 30-35.

Stone, however, did not deposit the $60,000 to petitioner's account but, upon directions of the state bank examiner, applied it to cash items of TMC. Thus when the Winn State Bank sent the $60,000 check to PSB for collection, there were insufficient funds to cover it. J.A. 35. It was not dishonored, however, but was held and the petitioner was notified of the shortfall.

Williams immediately went to the Sabine State Bank and completed negotiations on a $65,000 loan. J.A. 35. He gave PSB a check for $65,000 drawn on Sabine State Bank to cover the $60,000 item. But the $65,000 check was presented to the Sabine State Bank for payment one day before the loan proceeds were credited to his account. As a result the check was dishonored and PSB charged back petitioner's account. J.A. 16-17. After receiving notice of this dishonor, petitioner honored the obligation by giving

PSB a money order for the full amount. J.A. 16-17, 21, 35; Tr. pp. 35-36. The petitioner honored the check after receiving notice of dishonor consistent with his contractual representation under La. Rev. Stat. Ann. § 10:3-413(2) (1975).

## SUMMARY OF ARGUMENT

A. 1. 18 U.S.C. § 1014 (1970), as written, makes no reference to the cashing or depositing of checks, nor does it purport by its terms to prohibit "check kiting". As worded when originally enacted, § 1014 centered upon federal agencies which had responsibility primarily for making loans to farmers and homeowners. 18 U.S.C. § 1014 (1947), ch. 645, § 1014, 62 Stat. 952 (1948) (current version at 18 U.S.C. § 1014 (1970)). The 13 predecessor statutes to § 1014 also focused upon federal agencies or institutions which had responsibility for making loans to farmers and homeowners. None of the 13 predecessor statutes make mention of checks, their collection or check kiting.

Nothing in the legislative history of § 1014 evidences a Congressional concern with or intent to deal with the problem of "bad checks" or "check kiting" in relation to the institutions which are protected by § 1014. *United States v. Edwards*, 455 F. Supp. 1354 (M.D. Penn. 1978); *United States v. Pavlick*, 507 F. Supp. 359 (M.D. Penn. 1980); *United States v. Sher*, 505 F. Supp. 858 (W.D. Penn. 1981), *aff'd*, No. 81-1317 (3rd Cir. August 14, 1981). *Contra, United States v. Williams, supra; United States v. Payne, supra.* Therefore, a natural and reasonable reading of § 1014, with overall consideration of the statute and its legislative history, shows that this statute extends only to commercial or personal loan or credit transactions, not to bad checks and "check kiting". This conclusion is more

compelling in light of the well-established maxim of statutory construction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971).

2. By enacting 18 U.S.C. § 1014, Congress did not intend to expand the scope of federal jurisdiction to the problem of bad checks or to check kiting since by the original date of enactment of § 1014, virtually all American state jurisdictions had enacted statutes which specifically criminalized the drawer's passing of a check drawn upon an account having insufficient funds to satisfy the check. See Comment, Insufficient Funds Checks in the Criminal Area: Elements, Issues, and Proposals, 38 Mo. L. Rev. 432 (1973); Comment on Legislation, "Bad Check Laws", 44 Harv. L. Rev. 451, 453 & n. 13 (1931).

Congress itself evidenced its awareness of the "bad check" problem and its legislative remedies prior to the original enactment of § 1014 when it passed a provision for the District of Columbia which expressly governed bad checks. Ch. 273, 42 Stat. 820 (1922); D.C. Code Ann. § 22-1410 (1973). In light of the pervasive state legislation governing bad checks as well as Congress's own enactment for the District of Columbia of a bad check statute, it is clear that Congress did not intend when it passed § 1014 to make broad inroads into state jurisdiction. The judiciary should not assume that Congress intended a major expansion of federal criminal jurisdiction in enacting its criminal laws. *United States v. Enmons*, 410 U.S. 396 (1973). There is nothing in the legislative history of § 1014 which supports the conclusion that Congress intended to regulate the area of bad checks.

3. Counts II and III of the indictment similarly allege that the petitioner overvalued "a security, that is a check",

by the mere fact of presenting the check for deposit. The trial court charged the jury that a check is "a security." Section 1014, however, does not purport to prohibit the overvaluing of "a security". It prohibits, rather, the overvaluation of security in the sense of collateral. Counts II and III fail to allege that the check at issue in each count was "security" in the sense of collateral for a loan or credit transaction.

Examination of the 13 predecessor statutes clearly demonstrates that "security" is being used in the sense of collateral. See, e.g., 12 U.S.C. § 1123 (1940 ed.) and 12 U.S.C. § 1313 (1940 ed.) These statutes, for example, state in identical language:

> "Whoever willfully overvalues any property offered as security for any such advance shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both."

In concluding that a check is a "security", the Fifth Circuit in *Payne* placed significant reliance upon 18 U.S.C. § 2311 which contains a definitional provision defining "security" to include a check. This reliance is misplaced. Section 1014 is found in an entirely different chapter than § 2311 and does not contain a definitional provision. Again, when construing penal statutes, ambiguities are to be "resolved in favor of lenity." *United States v. Enmons*, 410 U.S. 396, 411 (1973). The fact that a bank may, under certain circumstances, have a security interest in a check does not mean that the check is "a security."

4. When a bank extends credit on an uncollected check, the check is not collateral on an obligation but is the obligation itself; such an advance of funds is an unsecured extension of credit. Louisiana Revised Statutes specifically provide that a check does not operate as an

assignment of any funds. La. Rev. Stat. Ann. § 10:3-409(1) (1975). The check becomes an enforceable obligation and is not security on an obligation. A bank is not obligated to give immediate credit on a check. La. Rev. Stat. Ann. § 10:4-213(4). Where it chooses to extend such credit and the check is subsequently dishonored, the result is simply an unsecured extension of credit, evidenced by the check. Consequently, Counts II and III fail to state a cause of action.

5. The indictment in this case did not allege a "check kiting" scheme nor did it allege an intent to defraud the bank. Notwithstanding this, the District Court instructed the jury that the Government had charged check kiting. J.A. 36-37.

The Fifth Circuit in *Payne* went to great lengths to emphasize that a check kiting scheme was present as its apparent justification for an expansive reading of § 1014. 602 F.2d at 1217, 1218. However, the elements of § 1014 do not include the element of proof normally required with a check kiting scheme, that is, proof of intent to defraud. See 18 U.S.C. § 1341; *United States v. Gross*, 416 F.2d 1205, 1206 (8th Cir. 1969), *cert. denied*, 397 U.S. 1013 (1970). Section 1014, virtually a strict liability statute, is totally inappropriate to charge check kiting which normally requires proof of an intent to defraud.

B. The Government contends in this case that by presenting a check to a collecting bank for deposit, the petitioner necessarily was representing that at the time he had funds deposited in the drawee bank account in an amount equal to or greater than the amount shown on the check. J.A. 2-4. Without such funds, the government contends the check is "overvalued" and, therefore, "false" within the meaning of § 1014. However, under the Louisi-

ana Revised Statutes, a check is simply an order to pay a sum certain in money, signed by the drawer, payable on demand and payable to order or to bearer. The contract of the drawer is clearly set out by La. Rev. Stat. Ann. § 10:3-413(2):

> "The drawer engages that upon dishonor of the draft in any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any endorser who takes it up. The drawer may disclaim this liability by drawing without recourse."

In effect the check is an unconditional promise to pay a sum certain. Thus the drawer does not represent by the mere act of presenting a check for deposit in a collecting bank that the check will not be dishonored; rather he only represents that if dishonored he will pay the check after any necessary notice of dishonor and protest.

In the case at bar, this is exactly what the petitioner did. After notice of dishonor he took the steps necessary to pay the check. J.A. 16-17, 21, 31-35; Tr. 35-36. Clearly, an uncollected check has value as an enforceable obligation to the face amount of the check. Therefore, the face amount of the check cannot constitute a false statement under § 1014 on the theory that it is "overvalued". *United States v. Edwards, supra* at pages 1356-57.

## ARGUMENT

### I. NEITHER THE LEGISLATIVE HISTORY NOR A FAIR AND NATURAL READING OF 18 U.S.C. § 1014 SUPPORTS THE CONCLUSION THAT CONGRESS INTENDED BY THE PASSAGE OF THIS STATUTE TO PROSCRIBE THE DEPOSIT OF CHECKS WITH INSUFFICIENT FUNDS OR TO PROSCRIBE CHECK KITING[5]

Counts II and III of the indictment allege that each of the two checks at issue is "a security", and further that each said check was false in that it was not of a value equal to the face amount of the check because at the time the check was presented for deposit at the collecting bank there were insufficient funds to cover the check then on deposit at the drawee bank. J.A. 2-4. However, the government also contended at the trial of this matter that the petitioner had engaged in a "check kiting scheme" in violation of 18 U.S.C. § 1014. The Court instructed the jury that the government charged Williams with "check kiting", notwithstanding the fact that the indictment made no such allegation. J.A. 2-4, 36-37.

The Court of Appeals for the Fifth Circuit in this matter concluded without analysis, relying primarily upon *United States v. Payne*, 602 F.2d 1215, 1219 (5th Cir. 1979),

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5. Although the sufficiency of the allegations of the indictment were not challenged by petitioner's trial attorney it is well established that the sufficiency of the indictment may be challenged for the first time on appeal. *United States v. Beard*, 414 F.2d 1014, 1017 (3rd Cir. 1969). Moreover, we submit that the issues raised are cognizable under Rule 52(b), Federal Rules of Criminal Procedure, as plain error. See, e.g., *Silber v. United States*, 370 U.S. 717 (1962) (per curium); *Newport v. Fact Concerts, Inc.*, 69 L.Ed.2d 616 (June 26, 1981); *New York Central Railroad v. Johnson*, 279 U.S. 310 (1929); *Brasfield v. United States*, 272 U.S. 448 (1926); *Pipefitters Local 562 v. United States*, 407 U.S. 385, 442, n. 52 (1972).

*cert. denied*, 455 U.S. 903 (1980), that the allegations constituted "classic incidents" of check kiting which could be charged under § 1014. *United States of America v. William Archie Williams*, 639 F.2d 1311, 1319-1320 (5th Cir. 1981). See Appendix to Petition, A19-20.[6] *Contra, U ted States v. Sher*, 505 F. Supp. 858 (W.D. Penn. 1981), *aff'd*, No. 81-1317 (3rd Cir. August 14, 1981).

The Fifth Circuit panel in *United States v. Payne*, *supra*, at 1218, also found that giving an insufficient funds check to a bank could constitute the overvaluation of a "security" in violation of 18 U.S.C. § 1014. 602 F.2d at 1218. *Contra, United States v. Edwards*, 455 F. Supp. 1354 (M.D. Penn. 1978). The petitioner contends in this matter that the Fifth Circuit's rulings regarding 18 U.S.C. § 1014 are contrary to both the language and history of the statute and should be disapproved.

### A. 18 U.S.C. § 1014 Focuses Upon Loans and Extensions of Credit and Does Not Extend to Checks or "Check Kiting"

The analysis of the meaning and reach of 18 U.S.C. § 1014 begins with the statute itself. 18 U.S.C. § 1014 provides:

> "Whoever makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of [certain enumerated financial institutions,] upon any application, advance, discount, purchase, purchase

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6. The indictment in this matter did not allege in Counts II and III that petitioner acted with intent to injure and defraud the bank. The Court instructed the jury on "check kiting" and apparently believed, as did the Fifth Circuit panel in *United States v. Payne*, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 455 U.S. 903 (1980), that such a charge was a necessary element of the offense.

> agreement, repurchase agreement, commitment or loan, or any change or extension of any of the same, by renewal, the deferment of action or otherwise, or the acceptance, release or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

As written, 18 U.S.C. § 1014 makes no reference to the cashing or depositing of checks, nor does it purport to prohibit what commonly is referred to as "check-kiting". See *United States v. Edwards*, 455 F. Supp. 1354 (M.D. Penn. 1978); *United States v. Pavlick*, 507 F. Supp. 359 (M.D. Penn. 1980); *United States v. Sher*, 505 F. Supp. 858 (W.D. Penn. 1981), *aff'd*, No. 81-1317 (3rd Cir. August 14, 1981), *petition for cert. filed*, No. 81-1047 (3rd Cir. Dec. 4, 1981). *Contra, United States v. Williams, supra; United States v. Payne, supra.* The statute as worded when originally enacted in 1948 focused upon federal agencies which had responsibility for making loans or other credit transactions primarily to farmers and homeowners.[7] The heading of § 1014 as originally enacted remains the same today, and underscores the focus of this statute: "Loan and credit transactions generally; renewals and discounts: crop insurance." Ch. 645, § 1014, 62 Stat. 952 (1948) (current version at 18 U.S.C. § 1014 (1970)).

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7. The institutions listed in 18 U.S.C. § 1014 (1970) as originally enacted were the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, any Federal intermediate credit bank, or the Federal Farm Mortgage Corporation, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or in which a Production Credit Corporation holds stock, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a National farm loan association or of a Federal Reserve bank.

As originally enacted, § 1014 was part of a bill passed to revise and codify Title 18 of the United States Code. In passing this bill, Congress was attempting to recodify the various criminal statutes which had been passed by the federal government prior to that date. Section 1014 as originally enacted in 1948 was derived from parts of 13 prior code provisions. H.R. 304, 80th Cong., 1st Sess. (1947), p. A85.

Each of the 13 predecessor statutes to § 1014 prohibited the making of false statements to particular federal agencies, the vast majority of which were primarily concerned with making loans to farmers and homeowners. *Id.* 7 U.S.C. §§ 1026(a) (1940 ed.), ch. 517, § 52, 50 Stat. 531 (1937) (current version at 18 U.S.C. § 1014) and 7 U.S.C. § 1514(a) (1940 ed.), ch. 30, § 514, 52 Stat. 76 (1946) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 596 (1940 ed.), ch. 6, § 22(h), 38 Stat. 272 (1913); ch. 653, § 3, 48 Stat. 1107 (1934) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 981 (1940 ed.), ch. 245, § 31, 39 Stat. 382 (1916); ch. 164, § 21, 49 Stat. 319 (1935) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 1123 (1940 ed.), ch. 245, § 211(c) (1916), as added ch. 252, § 2, 42 Stat. 1459 (1923) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 1138(d)(a) (1940 ed.), ch. 98, § 64, 48 Stat. 269 (1933); ch. 7, § 13, 48 Stat. 347 (1934) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 1248 (1940 ed.), ch. 252, § 209, 42 Stat. 1467 (1923) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 1312 (1940 ed.), ch. 252, § 216, 42 Stat. 1471 (1923) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 1313 (1940 ed.), ch. 252, § 216, 42 Stat. 1471 (1923) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 1441(a) (1940 ed.), ch. 522, § 22, 47 Stat. 739 (1932); ch. 614, § 203(a), 49 Stat. 704 (1935) (current version at 18 U.S.C. § 1014); 12 U.S.C. § 1467(a) (1940 ed.), ch. 64, § 8, 48 Stat. 134 (1933); ch.

168, § 12, 48 Stat. 647 (1934); ch. 150, §§ 20, 21, 49, 49 Stat. 298 (1935) (current version at 18 U.S.C. § 1014) and 15 U.S.C. § 616(a) (1940 ed.), ch. 8, § 16, 47 Stat. 11 (1932) (current version at 18 U.S.C. § 1014). The two predecessor statutes which do not focus only on making loans to farmers and homeowners nevertheless centered upon the making of loans. 12 U.S.C. § 596 (1940 ed.); 15 U.S.C. § 616(a) (1940 ed.). None of the prior statutes make mention of checks, their collection or check kiting. The transactions covered by the prior statutes and the wording of the statutes themselves in many instances involve collateral (usually real estate) given as security for loans and extensions of credit.

Significantly, nothing in the legislative history evidences a Congressional concern or a desire to deal with the problem of "bad checks" or "check kiting" in relation to the institutions which are protected by § 1014. *United States v. Sher, supra, United States v. Pavlick, supra; United States v. Edwards, supra.*

The 13 predecessor statutes to § 1014 either protected agencies and institutions which were not of the nature to be engaged in offering services such as checking and checking accounts or expressly related to loans without any mention or reference to check collection or check kiting.

An examination of the predecessor statutes supports the fact that Congress was concentrating on loans and credit transactions and not the depositing and collection of checks or "check kiting." 15 U.S.C. § 616(a) (1940 ed.), was part of a bill (H.R. 7360) creating the Reconstruction Finance Corporation. Public No. 2, 47 Stat. 11 (1932), 72nd Cong., 1st Sess. This bill authorized the appropriation of monies to be expended by the Secretary of Agriculture, in part, "for the purpose of making loans or advances to

farmers in the several States of the United States in cases where he finds that an emergency exists as a result of which farmers are unable to obtain loans for crop production during the year 1932. . . ." 15 U.S.C. § 602 (1940 ed.); ch. 8, § 2, 47 Stat. 5 (1932); ch. 520, § 2059(b), 47 Stat. 714 (1932); ch. 522, § (6)f, 47 Stat. 728 (1932); ch. 427, § 2, 54 Stat. 572 (1940). The bill also authorizes loans to banks and other institutions to "aid in financing agriculture, commerce, and industry including facilitating the exportation of agricultural and other products."

Title 7, U.S.C. § 1026(a) (1940 ed.) was enacted as part of the subchapter which created the Farmers' Home Loan Corporation. 7 U.S.C. § 1014 (1940 ed.), ch. 517, § 40, 50 Stat. 527 (1937). The Farmers' Home Corporation which was empowered to make loans or "rehabilitation loans" in the United States and elsewhere to enable certain qualified people to acquire farms (7 U.S.C. § 1001 (1940 ed.), ch. 517, § 1, 50 Stat. 522 (1937) (current version at 18 U.S.C. § 1014)), and to purchase livestock, farm equipment, supplies etc. . . . (7 U.S.C. § 1007 (1940 ed.), ch. 517, § 21, 50 Stat. 524 (1937) (current version at 18 U.S.C. § 1014)). 7 U.S.C. § 1514(a) (1940 ed.) is a part of the chapter cited as "Federal Crop Insurance Act" which was enacted so the federal government could provide crop insurance to protect against crop failure due to drought and other causes. 7 U.S.C. § 1502 (1940 ed.), ch. 30, § 502, 52 Stat. 72 (1938) (current version at 18 U.S.C. § 1014); 7 U.S.C. § 1508 (1940 ed.), ch. 30, § 508, 52 Stat. 74 (1938); ch. 563, 52 Stat. 835 (1938) (current version at 18 U.S.C. § 1014). This chapter created the Federal Crop Insurance Corporation. Security in this chapter refers to security for insurance premiums. 7 U.S.C. § 1508(b) (1940 ed.).

The heading of 12 U.S.C. § 596 (1940 ed.) demonstrates that overvaluation of security relates to security in

the sense of collateral for loans. The title reads "false statements or overvaluation of securities to secure loans. . . ."

12 U.S.C. § 981 (1940 ed.), 12 U.S.C. § 1123 (1940 ed.), 12 U.S.C. § 1138(d) (1940 ed.) and 12 U.S.C. § 1122, ch. 245, § 211(b) (1916) as added ch. 252, § 2, 42 Stat. 1459 (1923) (current version at 18 U.S.C. § 1014) all fall within the chapter titled "Farmers Credit Administration." 12 U.S.C. § 636 (1940 ed.), ch. 25, § 40, 48 Stat. 51 (1933) (current version at 18 U.S.C. § 1014). 12 U.S.C. § 981 (1940 ed.) refers only to "false statement in the application of such loan" or the willful overvaluation of "any loan offered as security for loans under the subchapter." 12 U.S.C. § 1123 (1940 ed.) similarly prohibits overvaluation of "property offered as security" for an advance or loan.

12 U.S.C. § 1122 (1940 ed.) does not reference overvaluation of security but rather deals only with false statements. 12 U.S.C. § 1312 (1940 ed.) and 12 U.S.C. § 1313 (1940 ed.) relate only to the National Agricultural Credit Corporation. Section 1313 prohibits overvaluation of property offered as security for an advance.

Finally, 12 U.S.C. § 1441(a) (1940 ed.) was part of a bill creating the Federal Home Loan Banks which were primarily concerned with the making of home mortgage loans.

From 1947 until 1970, a number of revisions were made in § 1014. These revisions, however, merely added new institutions to those previously specified in § 1014, or removed the names of certain institutions no longer in existence. The revisions did not change or alter the substantive wording of the statute nor did they mention check kiting or the problem of bad checks.

Thus the focus of the scant legislative history is upon attempts to mislead the specified institutions as to an ap-

plicant's credit worthiness, or the value of security offered for a loan or credit agreement. The Senate Banking and Currency Committee reflected this viewpoint in reporting upon the 1964 Amendment to § 1014, Pub. L. 88-353, § 5, 78 Stat. 269 (1964):

> "Section 5 of the bill would make it an offense . . . for anyone knowingly to make a false statement or report or willfully overvalue any land, property, or security to influence the action of a Federal credit union in connection with any application, loan, or the like * * * *Section 1014 is designed primarily to apply to borrowers from federal agencies or federally chartered organizations.* It is not, however, limited by its terms to borrowers and would seem also to apply to others, including, for example, officers and employees of the agencies and institutions named. * * * The committee was satisfied that it was appropriate to include Federal credit unions within Section 1014 in order to provide additional protection to Federal credit unions *against false statements or reports or willful overvaluations of land, property or security in connection with application for loans, etc.*" (Emphasis added)

S. Rep. No. 1078, 88th Cong., 2nd Sess. (1964), reprinted in 1964 U.S. Code Cong. & Ad. News 2519, 2520, 2522, 2523. This viewpoint was again reflected in the House Banking and Currency Committee Report on the first 1970 Amendment to § 1014, Pub. L. No. 91-468, § 7, 84 Stat. 1017 (1970):

> "Section 7 of the bill amends Section 1014 of Title 18 . . . *relating to false statements in loan and credit applications, to include insured State-chartered credit unions.*" H.R. Rep. No. 91-1457, 91st Cong., 2nd Sess. (1970), reprinted in (1970) U.S. Code Cong. & Ad. News 4166, 4187.

The amendments which may be considered to be directly involved in this matter include the addition of FDIC insured banks and FSLIC insured institutions, as well as others, to those institutions which § 1014 has reference. Remarks made on the House floor indicate that FSLIC insured institutions were included due to the perceived fraudulent overvaluing of property practices in relation to mortgages.[8]

The House Banking and Currency Committee Report on the latter 1970 Amendment to § 1014 again reflects a perception of the statute in terms of false statements as to creditworthiness, or as to the value of security for a loan. The pertinent provision of the amendment, Pub. L. No. 91-609, § 915, 84 Stat. 1815 (1970), was addressed in those terms:

> "Section 912 (later section 915) would describe more explicitly the institutions which are covered by 18 U.S.C. Section 1014, which provides penalties for making false statements or reports in connection with loans or other similar transactions." H.R. Rep. No. 91-1556, 91st Cong., 2nd Sess. (1970), reprinted in (1970) U.S. Code Cong. & Ad. News 5582, 5617, 5652-53.

The conference report on the legislation as a whole (the Housing and Urban Development Act of 1970) reflects the same emphasis and, moreover, makes it clear that no special consideration was given to the potential consequences of including FDIC insured banks among the covered institutions.

> "The House Bill contained a provision not in the Senate Amendment providing criminal penalties for making false statements or reports in connection with loans or other similar transactions involving an insured sav-

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8. 116 Cong. Rec. 42632-33 (December 19, 1970).

> ings and loan association. The conference substitute contains a House provision with an amendment applying the same penalties to financial institutions insured by the Federal Deposit Insurance Corporation and credit unions insured by the National Credit Union Share Insurance Fund." Conf. Rep. No. 91-1784, 91st Cong., 2nd Sess. (1970), reprinted in (1970) U.S. Code Cong. & Ad. News 5617, 5683-84.

In each instance that § 1014 has been amended, Congress only added new institutions to those previously specified in § 1014. A conclusion that Congress expanded the reach of § 1014 to cover a federal "bad check offense" or "check kiting" simply by specifying additional institutions is without legislative support and is unwarranted. This is demonstrated by remarks in the United States House of Representatives regarding the 1964 Amendment to 18 U.S.C. § 1014. The sponsor of this amendment stated:

> "The amendment is limited to federal credit unions and broadens existing law only to the extent of adding them to the statute." 109 Cong. Record 24791-24792 (1963).

There is no indication that the 1948 version of § 1014 was intended to have this reach, and the statute as revised in 1970 did not add any language even intimating that Congress intended to expand § 1014 to cover the depositing of checks or check kiting. Indeed, we are unaware of any reported case prior to 1978 involving prosecution under 18 U.S.C. § 1014 for only the submission of a check which, at the time it was presented for payment, was not covered by sufficient funds at the drawee bank to cover said check. It is not likely, if Congress had desired to utilize 18 U.S.C. § 1014 to prosecute bad checks, that the failure to utilize the statute as such would have passed unnoticed for so many years. *United States v. Enmons*, 410 U.S. 396

(1973).[9] This is especially true since prior to the original enactment of § 1014 (as will be discussed *infra*), virtually every state in this country and Congress itself, with respect to the District of Columbia, recognized the problem of bad checks by passing bad check laws. Comment on legislation, "Bad Check Laws," 44 Harv. L. Rev. 451, 451 & n. 13 (1931) (see statutes cited therein). See also pp. 24-30, *infra*.

Section 1014, if given a natural reading with overall consideration of the statute and its legislation, extends only to commercial and personal loan or credit transactions, not to bad checks and "check kiting." *United States v. Edwards*, 455 F. Supp. 1354 (M.D. Penn. 1978); *United States v. Pavlick*, 507 F. Supp. 359 (M.D. Penn. 1980); *United States v. Sher*, 505 F. Supp. 858 (W.D. Penn. 1981), *aff'd*, No 81-1317 (3d Cir. August 14, 1981), *petition for rehearing en banc denied* on October 6, 1981. *Contra, United States v. Payne, supra.* This conclusion is more compelling in light of the well established maxim of statutory construction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971). See *Stafford v. Brigg*, 444 U.S. 527 (1980).

> "In various ways over the years, we have stated that when choice has to be made between two readings of what conduct Congress has made a crime it is appropriate, before we choose the harsh alternative, to require that Congress should have spoken in language that is clear and definite." 404 U.S. at 347.

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9. As stated by this Court in *Enmons*:

"It is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved." See *United States v. Laub*, 385 U.S. 475, 485 (1967).

The history of 18 U.S.C. § 1014 has been carefully reviewed in only a few lower court decisions which have raised issues similar to the ones now before this Court. In all but one instance, the decision has been against including "check kiting" and bad checks within the reach of § 1014. *United States v. Sher, supra; United States v. Edwards, supra; United States v. Pavlick, supra; United States v. Payne, supra.*

As stated by the District Court in *United States v. Pavlick*:

> "In short, review of the legislative history vindicates the *Edwards* interpretation of Section 1014. The statute simply criminalizes fraud in credit transactions. Congress never intended that the measure reach schemes such as check-kiting, which remain within the exclusive jurisdiction of the states. Accordingly, the Government is incorrect in asserting that the indictment charges Pavlick with the violation of federal law." 507 F. Supp. at 364. See also *United States v. Sher, supra; United States v. Edwards, supra.*

Simply stated, the mere deposit of a check for collection does not rise to the level of a request for a loan or a credit transaction as contemplated by 18 U.S.C. § 1014.

### B. Neither the Legislative History nor the Language of the Statute Itself Supports the Expansion of Federal Criminal Jurisdiction Into an Area Which Is Covered by State Statutes

As further evidence that Congress did not intend to extend 18 U.S.C. § 1014 to the problem of bad checks or to check kiting is the fact that virtually all American state jurisdictions have enacted statutes which specifically criminalize the passing of a check drawn upon an account having

insufficient funds to satisfy the check, at least where the drawer knows or even intends that sufficient funds are or will be lacking to cover the checks. See *United States v. Payne*, 602 F.2d 1215, 1218 (5th Cir. 1979), *cert. denied*, 455 U.S. 903 (1980).[10]

Bad check statutes became widespread early in this century as the Federal Reserve System facilitated the use of checks as a medium of exchange.[11] Congress evidenced its awareness of the "bad check" problem and its legislative remedies *prior to the original enactment of § 1014* when it enacted a provision for the District of Columbia which expressly governed bad checks. Ch. 273 42 Stat. 820 (1922).[12]

The District of Columbia bad check provision is typical in most respects of state "bad check" legislation, most of which require as an element of proof that the defendant intended to defraud the bank. See, e.g., *Ciallo v. United States*, 325 F.2d 227 (D.C. Cir. 1963); Comment, Insufficient Funds Checks in the Criminal Area: Elements, Issues and Proposals, 38 Mo. L. Rev. 432, 436 & n. 29, 437 (1973). Prima facie establishment of knowledge, intent and purpose, by the fact of nonpayment, should the drawer fail to make good the draft within a specified period after notice of dishonor, also is typical of American "bad check"

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10. See Comment, Insufficient Funds Checks in the Criminal Area: Elements, Issues, and Proposals, 38 Mo. L. Rev. 432 (1973); Comment on legislation, "Bad Check Laws," 44 Harv. L. Rev. 451, 453 & n. 13 (1931).

11. 44 Harv. L. Rev. 451, 453 & n. 13 (1931) (see statutes cited therein).

12. Congress also amended the District of Columbia bad check statute in 1970, the year that Congress extended § 1014 to the Federal Deposit Insurance Corporation, FDIC insured banks, the Federal Savings and Loan Insurance Corporation, etc. . . ., and this provision remained applicable through and beyond 1973. D.C. Code Ann. § 22-1410 (1973).

legislation.[13] Most state statutes can be read as inapplicable where the drawer reasonably expected that the check would be satisfied when presented to the drawee in due course; many state courts have interpreted their "bad check" legislation as affording a reasonable expectation of payment defense.[14] Some statutes specifically provide a defense if the payee was informed that the check was not presently covered by sufficient funds when it received the check.[15] A few state statutes raise the fact of payment within a stated period after notice of the drawee's refusal to honor the check to the status of an affirmative defense.[16]

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13. E.g., Ala. Code § 13-4-118 (1975); Alaska Stat. § 11.20.220 (1970); Conn. Gen. Stat. § 53a-128 (1980); Del. Code Ann. tit. 11, § 900 (1974); Fla. Stat. Ann § 832.07 (West, 1970); Ga. Code § 26-1704 (1981); Haw. Rev. Stat. § 708-857 (1976); Kan. Stat. Ann § 21-3707 (Vernon, 1980); La. Rev. Stat. Ann. § 14:71 (West, 1981); Me. Rev. Stat. Ann. tit. 17-A, § 708 (1981); Mass. Gen. Laws Ann. ch. 266, § 37 (West, 1970); Mich. Comp. Laws Ann. § 750.132 (1981); Minn. Stat. § 609.535 (1980); Miss. Code Ann. § 97-19-57 (1981); Mo. Rev. Stat. § 570.120 (1978); Mont. Rev. Codes Ann. § 94-6-309 (1977); Neb. Rev. Stat. § 28-611 (1979); Nev. Rev. Stat. § 205.132 (1979); N.J. Stat. Ann. § 2C:21-5 (1981); N.M. Stat. Ann. § 30-36-6 (1980); Ohio Rev. Code Ann. § 2913.11 (Page, 1975); Okla. Stat. tit. 21, § 1541.4 (1980); Pa. Cons. Stat. Ann. § 4105 (Purdon, 1973); R.I. Gen. Laws § 19-19-4 (1981); S.C. Code § 34-11-70 (1980); Tenn. Code Ann. § 39-1906 (1975); Tex. Penal Code Ann. tit. 7, § 31.06 (Vernon, 1974); Vt. Stat. Ann. tit. 13, § 2022 (1974); Va. Code § 18.2-183 (1981); Wis. Stat. Ann. § 943.24 (1981); Wyo. Stat. Ann. § 6-3-125 (1981). See generally A.L.I. Model Penal Code § 224.5 (1962).

14. E.g., *Harris v. State*, 378 So.2d 257 (Ala. Crim. App. 1979), *cert. denied*, 378 So.2d 263 (Ala. Sup. Ct. 1979); *People v. Poyet*, 6 Cal.3d 530, 492 P.2d 1150, 99 Cal. Rptr. 758 (1972). *See Reasonable Expectation of Payment As Affecting Offense Under "Worthless Check" Statutes*, 9 A.L.R.3d 719.

15. Fla. Stat. Ann. § 832.05(2)(a) (West, 1979); Ind. Stat. Ann. § 35-43-5-5(f)(1) (Burns, 1981); Kan. Stat. Ann. § 21-3707(3)(b) (Vernon, 1980); N.M. Stat. Ann. § 30-36-6 (1980); N.D. Cent. Code § 6-08-16(1) (1981); S.C. Code § 34-11-60(d) (1980); W. Va. Code §§ 61-3-39. 61-3-39a (1981); *Cf.* S.D. Codified Laws Ann. §§ 22-41-2.2 (1979).

16. Ind. Stat. Ann. § 35-43-5-5(e) (Burns, 1981); N.H. Rev. Stat. Ann. § 638.4 (III) (1974); N.Y. Penal Law § 190.15(1) (McKinney, 1975); N.D. Cent. Code § 6-08-16(3) (1981); W. Va. Code § 61-3-39b (1981); Wyo. Stat. § 6-3-124(a) (1981).

Read against this background of bad check legislation and in the face of the enactment by Congress of a bad check law for the District of Columbia, the position of the United States that § 1014 criminalizes the willful passage of an insufficient funds check to an FDIC insured bank depends upon the speculative assumption that Congress intended when it passed § 1014 to make broad inroads into state jurisdiction. In this regard, it is a well established maxim of statutory construction of federal statutes that the judiciary should not assume that Congress intended a major expansion of federal criminal jurisdiction in enacting its criminal laws. *United States v. Enmons*, 410 U.S. 396 (1973); *United States v. Bass*, 404 U.S. 336 (1971). As previously discussed, there is nothing in the legislative history of § 1014 which supports the conclusion that Congress intended to regulate the area of bad checks, an area where there has been extensive state legislation.

The Fifth Circuit in *United States v. Payne, supra*, placed reliance upon the changes made to § 1014 in 1970 in concluding that "the intent of Congress was to incorporate in one codal section all of the business transactions of any of the specified agencies." 602 F.2d at 1219. However, the legislative history for the 1970 amendment provides no support for such an expansion of the substantive force of § 1014. It simply adds institutions to the protected list at a time when virtually all states had bad check legislation.

> "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *United States v. Bass, supra*, at 349.

In justifying its expansion of § 1014 to cover "check kiting" the Fifth Circuit in *Payne* also accorded significance to the fact that the 1970 amendment to § 1014 added institutions which were in fields other than farming and construction. Of more significance, however, is the fact that Congress when amending § 1014 in 1970 made no change to the substantive provisions of the statute, and did not discuss, confront or raise the bad check problem in the legislative history. Congress neither stated nor implied that it was expanding the reach of Section 1014 to enter a field already comprehensively regulated by the states. Given its passage of the District of Columbia bad checks law and the array of state legislation on this topic, Congress knew of the means available to express and effectuate any such intention. *Bell v. United States*, 349 U.S. 81, 83 (1955). Congress has never done so. The question is not whether Congress *could* have fashioned a federal statute to prosecute the presentment of "bad checks" or "check kiting", but rather whether Congress intended to do so. The Court in *Payne*, relying on Whitney, *The Law of Modern Commercial Practice*, § 341 (1965), concluded that "in giving a check one impliedly represents that he has on deposit" at the drawer bank "funds at least equivalent to the face amount of the check". The Fifth Circuit panel, however, failed to disclose the fact that Whitney reaches this conclusion by relying upon the enactment of the state bad check laws, not on the passage of 18 U.S.C. § 1014.[17] The lack of legislative history regarding 18

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17. Whitney, *Law of Modern Commercial Practice*, § 341 (1965) reads in relevant part as follows:

§ 341. "Bad" Checks.

In giving a check, the drawer impliedly represents that he has on deposit with the drawee bank funds equivalent to the face amount of the check. *If he has not, not only has he broken his promise to the holder that the check would*

(Continued on following page)

U.S.C. § 1014 as well as a reasonable analysis of the language utilized does not justify such a broad expansion of interpretation of this statute which would impact so seriously upon notions of judicial comity.

### C. A Check, As a Matter of Law Is Not "a Security"

Counts II and III of the indictment similarly alleged that the petitioner overvalued "a security, that is a check" by the mere fact of presenting the check for deposit. As discussed *infra*, § 1014 does not purport to prohibit the overvaluing of *"a security."* It prohibits, rather, the overvaluation of security; security in the sense of collateral. Given the focus of the statute upon loans and credit transactions (see discussion, pp. 14-24, *supra*), this is the reasonable interpretation of the word "security."

Support for the proposition that under § 1014 the word "security" is being used in the sense of collateral is also found in the predecessor statutes to § 1014. 12 U.S.C. § 1123 (1940 ed.) and 12 U.S.C. § 1313 (1940 ed.), for example, state, in identical language:

> "Whoever willfully overvalues *any property offered as security for any such advance* shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both."

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Footnote continued—

*be paid upon due presentment, but he has also been guilty of such fraud and misrepresentation as to be punishable as a crime, under statutes known as "bad check" laws. Although these statutes vary in different states, they all make the giving of a check without sufficient funds in the bank, and with the intent to defraud, a criminal offense,* and they usually treat the making and issuing of such a check prima facie evidence of intent to defraud and of knowledge of the insufficient funds at the time. (Emphasis added)

The bill of which 15 U.S.C. § 616(a) (1940 ed.) was a part expressly provided that all such loans be "fully and adequately secured." 15 U.S.C. § 616(a) (1940 ed.) prohibited the willful "overvalu[ing] of security, for the purpose of obtaining . . . any loans . . ." In light of the overall structure and wording of this prior statute it is clear that it focused on loans with the word "security" meaning security in the sense of collateral.

The interpretation of the words "overvalues . . . any security" as meaning security as collateral for a loan is also evidenced by 12 U.S.C. § 596 (1940 ed.). The heading of this section reads: "False statement or overvaluation of securities to secure loans, etc. . . ." Therefore, the plain and unmistakable purpose of this statute is to prohibit the overvaluing of security in the sense of collateral.

12 U.S.C. § 1441(a) (1940 ed.) includes the words "whoever willfully overvalues any security." In the context of this statute, "security" clearly means security as collateral for home loans since the Chapter containing this statute ("Federal Home Loan Bank Act") is primarily concerned with the providing of financing for home purchases. 12 U.S.C. § 1430 (1940 ed.), ch. 522, § 10, 47 Stat. 731 (1932); ch. 168, § 10, 48 Stat. 646 (1934); ch. 847, § 501, 48 Stat. 1261 (1934); ch. 150, §§ 5, 6, 49 Stat. 294 (1935), for example, provides in part that the "Federal Home Loan Bank is authorized to make advances . . . upon the security of home mortgages. . . ."

7 U.S.C. § 1514(a) (1940 ed.) is a bill providing for the issuance of crop insurance for crop failure, etc. This statute prohibited the "willful overvaluing of security" but the security as mentioned in the bill is as follows:

> ". . . Such premiums shall be collected at such time or times, in such manner, and upon such security as the

> Board may determine." 7 U.S.C. § 1508(b) (1940 ed.) (1938).

Clearly, security here means security in the sense of collateral.

12 U.S.C. § 1313 (1940 ed.) is titled "Overvaluation of property as security", again clearly in the sense of collateral. 12 U.S.C. § 981 (1940 ed.) reads, in relevant part, ". . . who shall willfully overvalue any land offered as security. . . ." See also, 12 U.S.C. § 1123 (1940 ed.) ("overvaluation of property offered as security for loan").

The Fifth Circuit in *United States v. Payne* concluded that a check is "a security" based on 18 U.S.C. § 2311, which is in the Chapter of Title 18 which deals with stolen property, and which specifically defines "a security" to include checks and notes for purposes of that chapter. From this the Fifth Circuit panel leaped to the conclusion that "security" as used in the Chapter on fraud and false statements (which includes 18 U.S.C. § 1014) also includes checks, despite the fact that said chapter contains no similar definition or provision. *Id.*, p. 1218. In light of the fact that § 2311 serves an entirely different function and purpose from § 1014, and in absence of a definitional provision, the language of a criminal statute should be strictly construed.

> "It remains true that penal statutes are to be strictly construed, with ambiguities resolved in favor of lenity." *United States v. Enmons*, 410 U.S. 396, 411. See also *Erlenbaugh v. United States*, 409 U.S. 239 (1972).

The Eighth Circuit in *United States v. Speidel*, 562 F.2d 1129 (8th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978) reviewed the definition of security in 18 U.S.C. § 2311 and recognized the fact that the definition of "securities" in this statute was broader than those under other federal

statutes. The ambiguity surrounding the definition of "security" can also be shown in another context. For example, the Fifth Circuit stated with respect to whether or not a note is a security that "the four elements of a security . . . are: (1) the presence of an investment; (2) a common venture; (3) a reasonable expectation of profits; and (4) such profits to be derived from the entrepreneural or managerial efforts of others." *American Bank of Nashville v. Gunter,* 620 F.2d 1108, 1116 (5th Cir. 1980). See also, *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837, 848, 858 (1975).

Pertinent factors in ascertaining security status in *Gunter* included whether the instrument was accompanied by an expectation of appreciation and value; or whether it involved a variable rate of return. *Id.* at page 1117. The Fifth Circuit concluded that an interest bearing note representing a participation interest in a loan did not constitute a "security". Obviously any contention that a personal check is a "security" is even less tenable.

The Fifth Circuit in *Payne* also quoted Ga. Code Ann. § 109A-4-208(1)(A)(C) which provides in part:

> "A bank has a security interest in . . . an item deposited in an account to the extent to which credit given for the item has been withdrawn or applied . . . and, if it makes an advance on or against the item."

This rendition of the Uniform Commercial Code is not the same as the provision in Louisiana which states that the bank has a lien, not a security interest. Nevertheless, the fact that a bank may have a security interest *in* a check does not mean that the check is "a security." Given the ambiguity surrounding the definition of "a security," this statute should be strictly construed in favor of the petitioner.

### D. A Check Is Not "Security" Within the Meaning of 18 U.S.C. § 1014 As Alleged by Counts II and III of the Indictment

Counts II and III fail to allege that the check at issue in each count was "security" in the sense of collateral for a loan or credit transaction. On this basis alone, Counts II and III should be dismissed even if this Court should conclude that a check can be security in the sense of collateral for a loan or other debt to a bank. See *Russell v. United States*, 369 U.S. 749 (1962). There simply is no allegation in this matter that the petitioner negotiated, requested or entered into any agreement (oral or otherwise) with the bank for it to issue immediate credit and to utilize the check as security for that extension of credit. J.A. 2-4. Cf. *United States v. Pavlick*, 507 F. Supp. 359, 365, n. 15 (N.D. Penn. 1980). Rather it is contended that the petitioner did no more than deposit the check in the collecting bank. J.A. 2-4. See also J.A. 7-10, 12-17, 28; Tr. p. 36.

Where a bank extends credit on an uncollected check, the check is not collateral on an obligation but is the obligation itself; such an advance of funds is an unsecured extension of credit.[18] The Louisiana Revised Statutes specifically provide that a check does not operate as an assignment of any funds. La. Rev. Stat. Ann. § 10:3-409(1). Where a bank extends funds on an uncollected check, and the check is then not honored, the bank merely has the right to have the check honored by the drawer. La. Rev. Stat. Ann. § 10:3-413(2). The check becomes an enforceable obligation; it is not security on an obligation:

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18. That is not to suggest that an individual could not give a check to a bank to secure an extension of credit or a loan. *See e.g. United States v. Pavlick*, 507 F. Supp. 359, 365, n. 15 (M.D. Penn. 1980). However, this is not what was alleged in this case.

> "Overdrafts, such as those involved here, do not leave a bank in the situation of having paid out money without a legally binding obligation for repayment. The Uniform Commercial Code, as well as other Code sections, not only creates an obligation between the drawer of the overdraft check and the payor bank, but also provides remedies for collection either on the check itself, on the money itself, or upon the obligation for which the check was drawn. In other words, the bank may enforce the debt created by the overdraft in the same manner as any loan or promissory note would be enforced." *United States v. Christo*, 614 F.2d 486, 493 (5th Cir. 1980).

It should be emphasized that a bank is not obligated to give immediate credit on a check; doing so, at least in the case of this issue, is a unilateral credit decision. La. Rev. Stat. Ann. § 10:4-213(4). Where it chooses to extend such credit and the check is subsequently dishonored, the result is an unsecured extension of credit, evidenced by the check. The government's evidence in the instant case so demonstrates. See J.A. 21-22. Under such circumstances the amount shown payable on a check is no different from the amount shown payable on an unsecured demand note.

Since the check upon which such funds are advanced constitutes the obligation itself, and not security on an obligation, it cannot be said that such a check is "security" within the meaning of § 1014. Therefore a check, under the instant circumstances, is not security in the sense of collateral, nor is it "a security".

### E. Expansion of § 1014 As Contended by the Government Will Allow Federal Prosecution of Bad Checks and Check Kiting Without Proof of Intent to Fraud

Counts II and III of the indictment each allege, and the facts adduced at trial show, only presentment of a check for deposit and no more. J.A. 2-4, 7-10, 12-17, 28; Tr. p. 36. The indictment does not allege a "check kiting" scheme nor does it allege an intent to defraud the bank. However, the Fifth Circuit in *Payne* went to great lengths to emphasize that a check kiting scheme was present as apparent justification or rationalization for its expansive reading of § 1014. 602 F.2d at 1217, 1218.

> "Here, we are not dealing with a man careless in balancing his check book. We have here two businessmen who contrived a kiting scheme that would have the effect of giving them credit or a loan or an advance on their false representation of the value of their checks." *Id.*

In light of *Payne's* emphasis on "check kiting," it is clear that the court in *Payne* did not intend to make proof of the mere deposit of a check with insufficient funds (as alleged in Counts II and III) sufficient to support a conviction under § 1014. This requirement of a "check kiting scheme" under § 1014 constitutes no more than judicial legislation which has the effect of expanding the reach of § 1014 without requiring the elements of proof normally required for a check kiting scheme, that is, proof of intent to defraud.

The panel in *Payne* stated its ruling was, in actuality, that *check kiting* could be a violation of 18 U.S.C. § 1014:

> This appeal presents the question whether "check kiting" violates 18 U.S.C. § 1014. We hold that it does.

*Payne* at 1216.

The panel then emphasized that check kiting was a *scheme to defraud*:

> " 'Check kiting, as practiced here, involves more than the mere use of a check with insufficient funds in the bank to meet it. It involves a series of acts which taken together constitute a scheme, a studied device, false pretenses built upon a series of false representations designed to lull the bank involved into a feeling of confidence and security . . . .' In short, check kiting, as engaged in by [the defendants], was a device for fraudulently obtaining credit sufficiently in the nature of an advance or loan to come within the scope of 18 U.S.C. § 1014."

*Payne* at 1219, *quoting Fidelity and Casualty Company of New York v. Bank of Alterberg*, 216 F.2d 294, 302-03 (8th Cir. 1954).

The panel apparently failed to appreciate, however, that 18 U.S.C. § 1014 is virtually a strict liability statute. As applied since its initial passage, intent to defraud is not an element of the offense. *United States v. Sabatino*, 485 F.2d 540, 544, 545 (2nd Cir. 1973), *cert. denied*, 415 U.S. 948 (1974) ("Proof that an applicant did not intend to defraud the bank is irrelevant to whether he intended to influence the bank by false statements.") If a knowingly false statement is proven, then a conviction is authorized. Any necessary proof of criminal intent, or *mens rea*, is minuscule.

The panel in *Payne*, nevertheless, apparently sought only to create a violation of § 1014 based upon the "overvaluation" of a check, where a fraudulent scheme was present. However both the language of § 1014 and the decisions construing it make it all too clear that this statute is totally inappropriate to the panel's intended end.

If left to stand, actions traditionally thought of as being dependent upon an intent to defraud will be made criminal without such proof. See 18 U.S.C. § 1341 (1970); *United States v. Gross*, 416 F.2d 1205, 1206 (8th Cir. 1969), *cert. denied*, 397 U.S. 1013 (1970). J.A. 11-12, 28-29. *Payne* itself recognized that "all states have 'bad check' laws" based on the concept that giving a kited check is a form of fraud and misrepresentation.[19] 602 F.2d at 1218. Therefore, the scope of § 1014 should not be expanded to reach "check kiting."

## II. COUNTS II AND III OF THE INDICTMENT MUST BE DISMISSED BECAUSE A NON-COLLECTED CHECK UPON WHICH A BANK EXTENDS CREDIT BECOMES AN ENFORCEABLE OBLIGATION WHICH CANNOT BE VIEWED AS "OVERVALUED", NOR AS A "FALSE STATEMENT" UNLESS IT IS UNENFORCEABLE

The government is contending in the case at issue that by presenting a check to a collecting bank for deposit, the petitioner necessarily was representing that at that time he had funds deposited in the drawee bank account in an amount equal to or greater than the amount shown on the check. J.A. 2-4. No questions were asked, nor was any evidence adduced at the trial of this matter which reflected any representations by or conversations between the petitioner and the person to whom the checks at issue were presented for deposit. J.A. 7-10, 12-17, 28; Tr. p. 36. Therefore, the government's case relies solely upon

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19. It should also be noted that "virtually every insufficient funds statute require specific intent to defraud. The prosecution must separately prove this element, and the mere passing of an insufficient funds check will normally not imply such intent." Comment, Insufficient Funds Checks in the Criminal Area: Elements, Issues, and Proposals, 38 Mo. L. Rev. 432 (1973).

theory that the check by itself constitutes the misrepresentation or false statement.

The representations inherent in commercial paper are specifically delineated by the Uniform Commercial Code, although these statutes vary from state to state. Under the Louisiana Revised Statutes, a check is a draft drawn on a bank and payable on demand. As such, a check is an order to pay a sum certain in money, signed by the drawer, payable on demand and payable to order or to bearer. La. Rev. Stat. Ann. § 10:3-104(1) (1975). A check does not "operate as an assignment of *any* funds in the drawee available for its payment. . . ." La. Rev. Stat. Ann. § 10:3-409(1) (1975). The contract of the drawer is set out by La. Rev. Stat. Ann. § 10:3-413(2) (1975):

> "The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any endorser who takes it up. The drawer may disclaim this liability by drawing without recourse."

In effect the check is an unconditional promise to pay a sum certain. Thus the drawer does not represent by the mere act of presenting a check for deposit in a collecting bank that the check will not be dishonored; rather he only represents that if dishonored he will pay the check after any necessary notice of dishonor and protest. Although he may disclaim that representation by drawing "without recourse", that is not the issue in this case since checks were not drawn without recourse.

In the instant case, this is exactly what the petitioner did. After notice of dishonor he took the steps necessary to pay the check. J.A. 12, 14, 16-17, 30-35; Tr. pp. 35-36. The government's theory depends upon the unreasonable conclusion that a check returned for insufficient funds is

without value. Clearly, an uncollected check has value in that it is an enforceable obligation; such obligation being enforceable to the face amount of the check. La. Rev. Stat. Ann. § 3-413(2) (1975). The check in fact is an asset of the bank where credit has been given. J.A. 22-23.

The Court in *United States v. Edwards*, at 1356-57, ruled that the face amount of a check cannot constitute a false statement because:

> "[A] check . . . is not the type of statement which can be true or false . . . . [A] check is simply a direction to a bank to pay the instrument according to its terms. A direction can be neither true nor false . . . only assertions of fact are capable of being true or untrue and it would seem that Section 1014 is designed only to prohibit such false statements of fact in connection with for example, an application for a loan." 455 F. Supp. at 1356-1357.

The face amount of a check arguably might be part of a false statement in a case where the drawer fails to honor the check upon dishonor and any necessary notice of dishonor and protest. A check, by statute, carries the representation that the drawer will take such action under such circumstances unless drawing without recourse. Therefore, a drawer's failure to do so might arguably support a jury finding that his representation that he would do so was false. However, this was not alleged by Counts II and III. Under the statute governing the checks at issue, the petitioner did no more than represent that he would pay the instrument if dishonored after receiving notice of dishonor. La. Rev. Stat. Ann. § 10:3-413(2) (1975). Consequently, there was no false statement as alleged in Counts II and III.

## CONCLUSION

For the reasons stated above, petitioner prays that his conviction on Counts II and III of the indictment be reversed and that said counts be dismissed with prejudice. Petitioner further prays, in light of the significant prejudicial evidence introduced at trial on Counts II and III, that the conviction on Count I of the indictment be reversed and remanded for a new trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Nickolas P. Chilivis, do hereby certify that I have this day served the within and foregoing Brief for Petitioner by mailing three copies thereof in envelopes properly stamped and addressed as follows:

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This 26th day of February, 1982.

NICKOLAS P. CHILIVIS